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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 vs.

14 GEORGE DJURA JAKUBEC,

15 Defendant.
16
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CASE NO. 10CR4828-LAB

**ORDER DENYING MOTION TO
VACATE SENTENCE UNDER 28
U.S.C. § 2255**

18 **Background**

19 In 2011 George Jakubec plead guilty to two counts of knowingly carrying and
20 brandishing a firearm during the commission and attempted commission of bank robbery,
21 violations of 18 U.S.C. § 924(c). As part of the plea bargain he negotiated, he explicitly
22 waived his rights to appeal or to collaterally attack his convictions, provided he was
23 sentenced to no more than 30 years in custody. Although Jakubec faced a sentence of up
24 to life imprisonment, the Court followed the plea bargain and imposed a 30 year sentence,
25 which happened to be the statutory minimum required sentence for the two offenses.

26 In 2016, Jakubec filed a motion pursuant to 28 U.S.C. § 2255 to vacate his sentence.
27 He argued that a subsequently decided case, *Johnson v. United States*, __ U.S. __, 135
28 S. Ct. 2551 (2015), rendered his sentence unconstitutional. *Johnson* invalidated the so-

1 called residual clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e), finding the
2 language of the clause was too vague to give adequate notice of what conduct was
3 prohibited. Section 924(c) also includes a residual clause with similar (but not exactly the
4 same) language. Jakubec argued in his motion that the language of the residual clause in
5 § 924(c) is close enough to the language condemned in *Johnson* so as to also be
6 considered unconstitutional.

7 Around the same time Jakubec filed his motion to vacate, the Supreme Court agreed
8 to consider another case, *Lynch v. Dimaya*, __ U.S. __, 2016 WL 3232911 (Sept. 29, 2016),
9 raising a vagueness challenge to 18 U.S.C. § 16, which also contains a residual clause with
10 language similar to that in the Armed Career Criminal Act. This court stayed resolution of
11 Jakubec's motion pending a decision in *Dimaya*. On April 17 of this year, the Supreme Court
12 decided *Dimaya*, and declared that the residual clause in Section 16 was also
13 unconstitutionally vague. In consideration of *Dimaya*, Jakubec renewed his motion to vacate
14 his convictions.

15 **Analysis**

16 Section 924(c) prohibits carrying or brandishing a firearm while committing a "crime
17 of violence." The statute defines "crime of violence" two ways. Either the offense is a felony
18 that:

19 (A) has as an element the use, attempted use, or threatened use of physical force
20 against the person or property of another, or

21 (B) that by its nature, involves a substantial risk of physical force against the
22 person or property of another may be used in the course of committing the offense.

23 The first clause of the definition, clause (A), is known as the "force clause," while
24 clause (B) is known as the "residual clause." *United States v. Dawson*, __ F. Supp. __, 2018
25 WL 1082839 at *3 (D. Oregon, Feb. 27, 2018). Jakubec's argument is that this court
26 implicitly relied on clause (B) when it found that armed bank robbery was "crime of violence,"
27 and that clause (B) is unconstitutionally vague. The record doesn't support the assumption
28 that the court relied on clause (B) in accepting Jakubec's guilty pleas. But it doesn't matter

1 in any event because armed bank robbery is categorically a “crime of violence” under clause
2 (A). *United States v. Watson*, 881 F.3d 782, 786 (9th Cir. 2017).

3 During Jakubec’s plea colloquy, the court explained the nature of the § 924(c) charge
4 to him:

5 the plea agreement says you are going to be pleading guilty to using a
6 firearm during a bank robbery on November 13, 2009. Then, again, using a
7 firearm during a second bank robbery on – attempted bank robbery on
8 November 13, 2009

9 Let me explain the nature of the charges to which you are pleading
10 guilty.

11 This crime of using a firearm during a crime of violence would require
12 the government to prove that you intended on, in the case of the completed
13 bank robbery, robbing a bank November 13.

14 It would have to be a federal crime, so they have to prove that it was a
15 federally insured bank and that you intended *by force* or intimidation or fear to
16 take money from that bank, and that in the course of the bank robbery that you
17 carried and brandished and used a firearm

18 The second charge, Mr. Jakubec, is the same. It lists a different
19 underlying crime. That is, attempted bank robbery. They say that that occurred
20 on November 27, 2009.

21 Again, if that were to go to trial, they’d have to prove the elements of
22 attempted bank robbery. They’d have to show it was a federally insured bank
23 and that you went in and *by force*, fear, and intimidation tried to get money that
24 didn’t belong to you. And then in the course of doing that, that you used a
25 firearm. You carried, brandished, and used a firearm, pointed it at a teller or
26 used it in some fashion

27 Reporter’s Transcript of Jakubec’s Guilty Pleas, March 14, 201, pp. 4-6 (emphasis added).

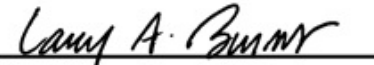
28 Jakubec’s contention of unconstitutionality focuses exclusively on the residual clause
of section 924(c) and ignores the force clause. That focus is inapt. The court told Jakubec
during the change of plea colloquy that the government had to prove that he committed an
underlying “crime of violence,” distinctly referring twice to the use of *force* in its explanation
of the nature of bank robbery. But even had the court relied on clause (B) of § 924(c) in
accepting Jakubec’s guilty pleas – and assuming that the language of clause (B) is
unconstitutional vague – any error was harmless because armed bank robbery is
categorically a “crime of violence” under clause (A). *Dawson*, 2018 WL 1082839 at *6 *citing*
Watson, 881 F.3 at 784-85. In other words, by admitting that he committed the crimes of

1 bank robbery and attempted bank robbery, Jakubec explicitly admitted that he committed
2 "crimes of violence." His convictions for violating § 924(c) were lawful and remain so under
3 clause (A), and he has failed to demonstrate any legal basis for vacating them. Because his
4 convictions aren't "illegal," *United States v. Torres*, 828 F.3d 1113, 1125 (9th Cir. 2016),
5 Jakubec's valid waiver of collateral attack forecloses his challenge and compels the denial
6 of his motion.

7 Jakubec's motion to vacate his convictions is **DENIED**.

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9 **IT IS SO ORDERED.**

10 DATED: May 1, 2018

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12 **HONORABLE LARRY ALAN BURNS**
13 United States District Judge
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